

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:)
)
CURT ALLAN MCKNIGHT and) CASE NO. 06-60937 JPK
STACEY LYNN MCKNIGHT,) Chapter 13
)
Debtors.)

ORDER REGARDING MATTER RELATING TO
TRUSTEE'S NOTICE OF CHANGE OF ADDRESS

On April 2, 2007, the Court held a hearing with respect to matters relating to the Notice of Change of Address filed by the Chapter 13 Trustee on February 16, 2007. The Chapter 13 Trustee appeared by Attorney Julia M. Hoham.

The hearing was scheduled by the Court's order entered on February 28, 2007. As stated in that order, the purpose of the hearing was to address a long-standing practice in the United States Bankruptcy Court for the Northern District of Indiana, Hammond Division, by which the Chapter 13 Trustee filed documents designated as "Notice of Change of Address", in response to which the Clerk of the Court changed the designation of the debtor's address in the Court's docket record. By administrative direction to the Clerk, the undersigned judicial officer directed the Clerk to no longer change the docket record designation of the debtor's address in response to Notices of Change of Address filed by the Chapter 13 Trustee.¹

The issue addressed at the hearing held on April 2, 2007 was strictly limited to whether

¹ In what the Court admits was a "knee jerk" reaction to the long-standing practice of changing the docket record designated address of the debtor in response to notices filed by the Chapter 13 Trustee – a practice of which the Court was unaware until recently – the Court issued an order entered on February 7, 2007 in the case of Yolanda Vertell Weems, Case Number 04-64690. The undersigned judicial officer caused this order to be posted on the Court's web site and to be widely disseminated to practitioners who practice before him. This order has also been published by Westlaw as a reported decision. The Court's action in issuing the foregoing order, and in causing its dissemination, was precipitous. In addition, the Court's addressing of certain issues in that order was purely *dicta* and has no precedential value. Given the uncertainty of issues regarding due process notice addressed in that order, the Court has separately entered an order by which the order entered on February 7, 2007 in Case Number 04-64690 has been vacated.

or not the Chapter 13 Trustee should file any statement regarding the debtor's address.

At the hearing held on April 2, 2007, Attorney Julia M. Hoham stated that in the ordinary course of the functioning of the Chapter 13 Trustee's Office, it occasionally becomes apparent that a debtor has moved, or has otherwise changed a mailing address, in a manner which results in the address designated by the debtor on the Court's record to be no longer an address at which the debtor may be reasonably contemplated to receive notice of matters relating to his/her/their case. For the purposes of this order, the Court finds that there are circumstances in which debtors do not comply with the obligation imposed by Fed.R.Bankr.P. 4002(5) that they "file a statement [with the Court] of any change of the debtor's address". The Court will also take notice that its case records establish that at times mailings made by the Court to debtors at the address last-designated by the debtors are returned to the Court with notations by the United States Postal Service that state, among other things, "moved, left no forwarding address", "addressee unknown" or other similar notations evidencing that the address utilized had no present relation to the mailing address of the debtor(s).

Thus, the Court finds that there are clearly circumstances in which actual notice to the debtor(s) of matters in relation to a case are thwarted by failure of debtor(s) to comply with Fed.R.Bankr.P. 4002(5).

The procedure which has evolved over more than a decade in the United States Bankruptcy Court for the Northern District of Indiana, Hammond Division, with respect to the Chapter 13 Trustee's filing of a "Notice of Change of Address" was clearly well-intended. As stated on the record at the hearing held on April 2, 2007 by Attorney Hoham, the Trustee at times becomes aware of changes of address by direct communications from the debtor – communications obviously not made to the debtor's counsel in cases in which the debtor is represented by counsel, or otherwise to the Court – and by the Trustee's attempts to communicate by mail with the debtor which are responded to by notices from the United States

Postal Service that the debtor's address has changed. Notice – real, actual notice to a debtor – of matters which relate to his/her/their case is a goal to be pursued, and to be advanced by persons in the position of the Chapter 13 Trustee who are officers of the Court in a very real and symbiotic context in relation to the administration of Chapter 13 cases. The Trustee's practice of filing a "Notice of Change of Address" was totally motivated by a desire to provide real and effective notice to debtors, and the Trustee is to be lauded for this motivation.

There are two distinct, and nearly mutually exclusive, issues which arise with respect to an address utilized to mail materials to the debtor with respect to matters which relate to the debtor's Chapter 13 case. The first is the general notice function provided by Fed.R.Bankr.P. 2002 with respect to matters which generally relate to administration of a bankruptcy case. The second is with respect to affirmative action sought to be undertaken against the debtor in an adversary proceeding pursuant to Fed.R.Bankr.P. 7001, *et seq.*, or in a contested matter subject to Fed.R.Bankr.P. 9014.

With respect to substantive matters involving the debtor under Fed.R.Bankr.P. 7001 or Fed.R.Bankr.P. 9014, the manner of service of process upon the debtor is provided by Fed.R.Bankr.P. 7004(b)(9), or alternatively by personal service under Fed.R.Bankr.P. 7004(a)(1)/Fed.R.Civ.P. 4(e)(2).² However, Rule 7004(b)(9) is clear: service by mail of

² Query: Are these Rules intended to provide the mechanism by which the Court acquires *in personam* jurisdiction over the debtor(s) in relation to an adversary proceeding or contested matter, or in relation to the debtor are these Rules at least in part meant to be a mechanism for notice to the debtor, apart from a means of acquisition of personal jurisdiction? This Court submits for consideration the proposition that by the filing of a bankruptcy petition, the debtor has perhaps submitted himself/herself/themselves to the *in personam* jurisdiction of the United States Bankruptcy Court to determine all matters concerning the debtor within the Court's jurisdiction in relation to a case. Thus, in the context of the Court's acquiring jurisdiction over the person of the debtor to determine matters subject to Fed.R.Bankr.P. 7001 and/or Fed.R.Bankr.P. 9014, without any service of process the Court may already have personal jurisdiction over the debtor. Perhaps Rules 7004(b)(9) and 9014(b) as to the manner of service upon a debtor may be unnecessary with respect to providing the Court with *in personam* jurisdiction with respect to matters asserted against the debtor, and may be more focused on providing debtors with notice of matters which affect their more substantive interests in their

summons and a copy of the complaint in an adversary proceeding, and of a motion initiating a contested matter under Rule 9014, with respect to the debtor is to be effected by service upon "the debtor at the address shown in the petition or to such other address as the debtor may designate in a filed writing". In addition, Rule 7004(g) requires – if the debtor is represented by an attorney – service upon the attorney by any means authorized under Fed.R.Civ.P. 5(b). Thus, for the purposes of the entry of a valid order or judgment with respect to any matter invoked against the debtor(s) which is the subject of an adversary proceeding or contested matter, utilization of the last-designated address of the debtor, as filed in writing by or on behalf of the debtor, is necessary, unless personal service is effected under Fed.R.Bankr.P. 7004(a)/Fed.R.Civ.P. 4(e)(2).

For the purposes of the Court's acquisition of *in personam* jurisdiction over the debtor(s) with respect to an adversary proceeding or a contested matter, any filing by the Trustee or a third party which indicates an address other than that designated by the debtor has no effect for the purpose of service by mail under Fed.R.Bankr.P. 7004(b)(9). There is an inherent potential confusion created in the record by the Trustee's "Notice of Change of Address" with respect to the address to be utilized pursuant to Fed.R.Bankr.P. 7004(b)(9), a confusion which can best be avoided by prohibiting the Trustee from filing the Notice, no matter how well-intentioned the filing of that Notice may be. As a result, the Court finds that the "Notice of Change of Address" filed by the Trustee serves no purpose with respect to the Court's acquisition of *in personam* jurisdiction over the debtor by service by mail with respect to either adversary proceedings or contested matters, and that the potential confusion of litigants with respect to the address stated in that Notice results in a determination that the Notice should not be filed.

The foregoing being said, assuming that the Court has *in personam* jurisdiction over the

cases. Food for thought: the Court expresses no position on this Query.

debtor with respect to adversary proceedings and contested matters which implicates the debtor in bankruptcy cases without the debtor ever actually receiving the complaint and summons in an adversary proceeding, or the initiating motion in a contested matter – there remains the issue of notice to the debtor of matters which substantively affect interests of the debtor in a bankruptcy case. It is beyond question that many debtors do not comply with the requirements of Fed.R.Bankr.P. 4002(5), and that attempts to provide notice to debtors at the last-designated address provided by them or by their attorney (as their solely authorized agent) will be ineffective to provide debtors with actual notice of matters which substantially affect their interests in cases under the Bankruptcy Code. However, there is no issue before the Court as to whether or not service of a complaint in an adversary proceeding or service of a motion initiating a contested matter, upon a debtor, which is mailed by first class mail to the debtor's last-designated address on the Court's record – but which is returned to the sender in a manner which indicates that the debtor did not receive notice of the filing – comports with due process. Without an active case before it, the Court will not express any opinion as to this issue.³

The due process notice cases of the United States Supreme Court are essentially focused on the Fifth Amendment of the United States Constitution, and on the Fourteenth

³ In *In re Vincze*, 230 F.3d 297 (7th Cir. 2000), the United States Court of Appeals for the Seventh Circuit refused to void a judgment obtained against Chapter 7 debtors in an adversary proceeding in which the complaint and summons were served upon the debtors at their last-designated address, against an assertion by the debtors that they were overseas at the time of service and thus did not receive notice of the action. Nothing in the record in that case indicates that any service made upon the debtors was returned as being undeliverable, and the argument advanced by the debtors was that the Court had not acquired personal jurisdiction over them and thus that any judgment against them was void. The Seventh Circuit quite correctly held – under the facts as they are stated in the case – that there was no indication in the record that the debtors had not in fact received notice of the adversary proceeding by means reasonably calculated to provide them with notice of the adversary proceeding. The fact that the debtors did not actually receive notice was attributable to their actions alone, and not to any action by a creditor which indicated to the creditor that the debtors did not receive notice of the pendency of the action. Thus, this case does by implication stand for the proposition that service in the manner required by Fed.R.Bankr.P. 7004(b)(9) is necessary to the validity of a final judgment or order in relation to the debtor.

Amendment of the United States Constitution which extends the Fifth Amendment to the States. The nature of the interest protected by Constitutional due process is broader than a property interest. As stated in *Mullane v. Central Hanover Bank & Trust Co.*, 70 S.Ct. 652, 656-657 (1950):

Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

In *Mennonite Board of Missions v. Adams*, 103 S.Ct. 2706, 2709 (1983), the foregoing pronouncement was emphasized, as follows:

In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L. Ed. 865 (1950), this Court recognized that prior to an action which will affect an interest in life, liberty, or property protected by the Due Process Clause of the Fourteenth Amendment, a State must provide "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (emphasis supplied)

The right of a creditor to receive notice of matters in a bankruptcy case which affect its property interests invokes due process; *City of New York v. New York, N.H. & H.R. Co.*, 73 S.Ct. 299 (1953); See, *Bank of Marin v. England*, 87 S.Ct. 274 (1966). Notice of an action for forcible entry and detainer by a landlord, posted on the tenant's door, does not provide Constitutionally acceptable due process notice to the tenant in relation to the action; *Greene v. Lindsey*, 102 S.Ct. 1874 (1982). General awareness of the pendency of a bankruptcy case does not give rise to a duty to be apprised of matters which affect a party's interests in that case which eviscerates the requirement of specific notice of matters which affect those interests; *City of New York v. New York, New Haven & Hartford Railroad Company*, *supra*, 73 S.Ct. 299, 301; In

re Rideout, 86 B.R. 523, 526-528 (Bankr. N.D. Ohio 1988).⁴ Moreover, "a party's ability to take steps to safeguard its interests does not relieve the State [or the party required to give due process notice] of its Constitutional obligation", *Mennonite Board of Missions, supra*, 103 S.Ct. 2706, 2712.

The foregoing being said, that is all that will be said. Whether or not the foregoing due process principles apply to debtors who are the "targets" of adversary proceedings or contested matters is not before the Court.⁵

Let's assume that an order is entered in a contested matter or in an adversary proceeding in a circumstance in which it known that the debtor did not receive notice of the matter or adversary proceeding by "service" pursuant to Fed.R.Bankr.P. 7004(b)(9). Certainly, whether or not that judgment could be sustained under principles of due process notice should be a concern to the litigant who initiated the adversary proceeding or contested matter against

⁴ The Court should note that it does not concur with the decision of *In re Park Nursing Center, Inc.*, 766 F.2d 261 (6th Cir. 1985) that defective notice required by due process can be ameliorated by providing the disenfranchised party with a remedy to set aside a judgment obtained by defective notice. The Court views this analysis to be contrary to the Supreme Court's clear determinations that effective notice is necessary at the inception of a proceeding which implicates due process notice requirements. The Court is also aware of the determination in *In re Aranjo*, 292 B.R. 19 (Bankr. Conn. 2003), which held that the fact that the debtor did not receive notice of an order upon which a Chapter 7 trustee's complaint for revocation of discharge under 11 U.S.C. § 727(d)(3)/§ 727(a)(6)(A) was based [refusal by the debtor to obey a lawful order of the court] was of no never-mind because the failure to receive the order was the debtor's fault because he had moved from his address designated with the Court. The decision to revoke a discharge based upon the debtor's failure to obey an order which the debtor did not receive cannot in this Court's view be justified under 11 U.S.C. § 727(a)(6)(A).

⁵ A debtor in a bankruptcy case does not have a constitutional right to file bankruptcy, but rather has a privilege subject to Congressional definition. Article I, Section 8 of the United States Constitution empowers Congress to "establish . . . uniform rules on the subject of bankruptcies throughout the United States". Without writing a treatise on the distinction between a "right" and a "privilege" under the United States Constitution, suffice it to say that matters relating to a debtor's interests in a bankruptcy case – derived as they are from a Constitutional grant of a power to Congress to establish laws – may, or may not, rise to the level of an interest of a citizen of the United States subject to Constitutional due process protection.

the debtor. The record established before the Court at the April 2, 2007 hearing established that the Trustee in some circumstances may be in a position to advise litigants who proceed against the debtor of an address more reasonably calculated to provide actual notice than that designated by the debtor in the Court's record. Should the filing of the "Notice of Change of Address" be sustained on the basis of potentially providing litigants with an address for the debtor more reasonably calculated to provide notice, or in order to potentially provide litigatns with an address for personal service under Fed.R.Civ.P. 4(e)(2)?

It is the obligation of every litigant who appears before a federal court to make certain that the Court is provided with both subject matter and personal jurisdiction over a defendant or adverse party. That obligation arises independently of the Court, or independently of the Court's providing for a record which may allow for effective notice. The record made at the April 2, 2007 hearing establishes that the Chapter 13 Trustee may be a source for a mailing address for the debtor which is more reasonably calculated to lead to notice to the debtor than is the address designated by the debtor on the Court's record. The question then arises: how certain can any litigant be that the address stated in the Trustee's "Notice of Change of Address" at the time of the initiation by the litigant of a contested matter or adversary proceeding, is reasonably calculated to give the debtor notice of matters to which the debtor may be Constitutionally entitled to reasonable notice, or may be an address at which the debtor may be personally served? The answer to this question is – not very certain. Any notification the Trustee receives of a debtor's current address is fleeting, and is only potentially viable as of the date the Trustee receives information concerning a current address for the debtor. Can the Trustee's knowledge concerning a potentially viable address for the purposes of notice ever guarantee that notice would be provided to the debtor at that address? The answer is "no". As a result, even if one were to assume that notice to other than the debtor's last-designated address as provided by Fed.R.Bankr.P. 7004(b)(9) is Constitutionally mandated in certain circumstances – an

assumption upon which the Court expresses no opinion as to its legal accuracy – the filing by the Chapter 13 Trustee of a "Notice of Change of Address" does not provide the temporal certainty of providing the debtor with actual notice which would justify the Court's sanctioning of the filing of that document by the Trustee.

The filing of a "Notice of Change of Address" by the Trustee is clearly ineffective to alter the provisions of Fed.R.Bankr.P. 7004(b)(9). The filing of that Notice leads to confusion and uncertainty as to the Court's endorsement of that address for any purpose in a bankruptcy case. The potential for providing a more effective means of notice to the debtor by means of this filing is not justified due to the temporally ephemeral efficacy of the address stated in the Notice.

The Court finds that there is no authority in applicable law or rules for the Trustee's filing of a "Notice of Change of Address". The Court further finds that the well-intended purpose of the Trustee in filing these documents is more than offset by the confusion created by review of the record by third parties as to the efficacy of that address for any jurisdictional or notice purpose, and that the filing of a "Notice of Change of Address" by the Chapter 13 Trustee should be barred in the United States Bankruptcy Court for the Northern District of Indiana, Hammond Division.⁶

IT IS ORDERED that the "Notice of Change of Address" filed by the Trustee on

⁶ Anyone who reads this determination and who is concerned about the potential impact of providing "due process" notice to bankruptcy debtors in a circumstance in which the debtor's designated address is clearly insufficient to provide that notice is counseled to consult with the Chapter 13 Trustee as to the Trustee's most current information as to an address most reasonably calculated to provide the debtor with notice of matters which affect the debtor's interests in a bankruptcy case. Additionally, the identity of the person or entity who actively files a designation of address stated by the debtor is of no moment to the Court as to its effectiveness under Fed.R.Bankr.P. 7004(b)(9), as long as the debtor(s) personally state the designation. Attached is a form that may be used by any entity to cause the designation of the mailing address of the debtor(s) to be changed on the Court's record. Finally, if a litigant is able to actually locate the debtor, service pursuant to Fed.R.Bankr.P. 7004(a)/Fed.R.Civ.P. 4(e)(2) will be effective for all purposes.

February 16, 2007 is stricken from the record.

IT IS FURTHER ORDERED that any person or entity involved in any bankruptcy case in the United States Bankruptcy Court for the Northern District of Indiana, Hammond Division, shall not file any document on a record of this Court which generally concerns the current address of a debtor, unless the attached form is utilized.⁷

Dated at Hammond, Indiana on May 22, 2007.

/s/ J. Philip Klingeberger
J. Philip Klingeberger, Judge
United States Bankruptcy Court

Distribution:
Debtor, Attorney for Debtor
Trustee, US Trustee

⁷ As stated above, this order does not determine any issue concerning the requirements of "due process" notice to a debtor of matters in relation to a bankruptcy case initiated by means of an adversary proceeding or a contested matter. The Court has vacated its order entered on February 7, 2007 in the Chapter 13 Case of Yolanda Vertell Weems, case number 04-64690. The Court notes, however, that it is the Court's view that Fed.R.Bankr.P. 7004(b)(9) governs the invocation of *in personam* jurisdiction over the debtor in an adversary proceeding or a contested matter, service in accordance with that rule necessarily provides the Court with *in personam* jurisdiction over an adversary proceeding or a contested matter in relation to the debtor, and failure to serve process in accordance with that Rule will result in a void determination. Whether or not that procedure provides notice in accordance with due process to the debtor of a contested matter or adversary proceeding is not in any manner determined by this order. If the notice function of service in accordance with Fed.R.Bankr.P. 7004(b)(9) is deemed by a moving litigant in a contested matter or by a plaintiff in an adversary proceeding to fall short of due process requirements with respect to notice to a debtor, the litigant is invited by the Court to either make use of personal service under Fed.R.Bankr.P. 7004(a)/Fed.R.Civ.P. 4(3)(2), or apply to the Court for an order pursuant to 11 U.S.C. § 105(a) and Fed.R.Bankr.P. 9007 – apart from Fed.R.Bankr.P. 7004(c) – to determine the manner in which notice reasonably calculated to apprise the debtor of the matter before the Court may be provided.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:

)
)
) CASE NO.
) Chapter
Debtor(s).)

STATEMENT OF CHANGE OF DEBTOR'S ADDRESS

I, _____, the debtor(s) in the above-designated case, hereby state that my mailing address has changed from the previous mailing address furnished to the Court. My new mailing address is:

and this address is effective as my mailing address for the purpose of receiving notices relating to my bankruptcy case as of _____. I authorize the Clerk of the United States Bankruptcy Court to change the designation of my mailing address pursuant to Fed.R.Bankr.P. 4002(5).

Dated: _____ Debtor

Dated: _____ Co-Debtor